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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS D. KLEMENS, THOMAS G. GIEFER, ROY A.C. HILL, and ROBERT G. MAIERS,
Petitioners,

-v-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER AN "ASSESSMENT" IMPOSED IN VIOLATION OF A UNION'S CONSTITUTION IS AN "ASSESSMENT" WITHIN THE MEANING OF THE PROVISO TO SECTION 2, ELEVENTH (a), OF THE RAILWAY LABOR ACT?

II. WHETHER AN "ASSESSMENT" IMPOSED IN VIOLATION OF A UNION'S CONSTITUTION IS A "PENALTY" INCLUDED IN THE PROVISO TO SECTION 2, ELEVENTH (a), OF THE RAILWAY LABOR ACT?

III. WHEN A CASE IS PROPERLY BEFORE A UNITED STATES DISTRICT COURT UNDER 28 U.S.C. § 1337, DOES THE DOCTRINE OF PENDENT JURISDICTION EMPOWER THE COURT TO CONSIDER WHETHER AN "ASSESSMENT" WAS AUTHORIZED BY A UNION'S CONSTITUTION?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REPORT OF OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT 6

A. DENIAL OF INDIVIDUAL RIGHTS GRANTED BY STATUTE RAISES IMPORTANT QUESTIONS WORTHY OF DECISION BY THIS COURT 6

B. A LEVY NOT AUTHORIZED BY THE UNION'S CONSTITUTION IS A "PENALTY" UNDER THE ACT 8

Page

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON PENDENT JURISDICTION 10

CONCLUSION 14

APPENDIX

OPINION OF THE COURT OF APPEALS 1a

ORDER OF THE DISTRICT COURT, FEBRUARY 24, 1981 ..... 21a

ORDER OF THE DISTRICT COURT, OCTOBER 31, 1980 ..... 31a

ORDER OF THE DISTRICT COURT, FEBRUARY 12, 1980 ..... 39a

ORDER OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING 47a

TABLE OF AUTHORITIES

Cases *Page*

Brotherhood of Railway Clerks v. Allen, 373 U.S. 113 (1963) 6, 7

Ellis v. Railway Clerk, ____ U.S. ____ 104 S. Ct. 1883 (1984) 6, 7

Felter v. Southern Pacific Co., 359 U.S. 326 (1959) 6

International Association of Machinists v. Street, 367 U.S. 740 (1961) 6, 7, 9

International Brotherhood of Boilermakers v. Hardeman, 401 U.S. 233 (1971) 8

Kavit v. A.L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974) 13

Klaus v. Hi-Shear Corporation, 528 F.2d 225 (9th Cir. 1975) 13

Mobil Oil Corporation v. Kelley, 493 F.2d 784 (5th Cir. 1974) 11, 13

Ohio Hoist Manufacturing Co. v. LiRocchi, 490 F.2d 105 (6th Cir. 1974) 13

Cases *Page*

Osborn v. Bank of the United States,
22 U.S. (9 Wheat.) 738 (1824) 10

Railway Employes' Department v. Hanson,
351 U.S. 225 (1956) 6, 7

Rosado v. Wyman, 397 U.S. 397 (1970) 9, 11

Rumbaugh v. Winifrede R. Co., 331
F.2d 530 (4th Cir.), *cert. denied*,
379 U.S. 929 (1964) 12

*State of Arizona v. Cook Paint & Varnish
Co.*, 541 F.2d 226 (9th Cir. 1976), *cert.
denied*, 430 U.S. 915 (1977) 13

Tranksok Pipeline Co. v. Darks,
565 F.2d 1150 (10th Cir. 1977) 13

*United Association of Journeymen v. Local
334*, 452 U.S. 615 (1981)..... 8

United Mine Workers of America v. Gibbs,
383 U.S. 715 (1966) 10, 13

Vanderboom v. Sexton, 422 F.2d
1233 (8th Cir. 1970) 12

Statutes

28 U.S.C. § 1254(1) 2

Statutes *Page*

28 U.S.C. § 1337 8

Labor Management Reporting and Disclosure Act, Section 101(a)(4) 4

Railway Labor Act, Section 2, Eleventh, 45 U.S.C. § 152, Eleventh ..... *passim*

No. _____

IN THE

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THOMAS D. KLEMENS, THOMAS G. GIEFER,
ROY A.C. HILL, and ROBERT G. MAIERS,
Petitioners,

-v-

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION

The Petitioners pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 3, 1984.

REPORT OF OPINIONS BELOW

The opinion of the Court of Appeals is reported at 736 F.2d 491 (9th Cir. 1984). The order of the District Court is reported at 113 L.R.R.M. 2825 (W.D. Wash. 1981). Prior orders of the District Court in this proceeding are reported at 484 F. Supp. 186 (W.D. Wash. 1980) and 500 F. Supp. 735 (W.D. Wash. 1980).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals is dated April 3, 1984. Petitioners' petition for rehearing was denied on June 26, 1984 and their petition for rehearing *en banc* was rejected on the same date. This Petition for a Writ of Certiorari is filed within 90 days of the latter date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provides in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the

employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

STATEMENT OF THE CASE

The District Court summarized the factual background of this controversy in its order of February 12, 1980 as follows:

> In 1972, the plaintiff, Thomas D. Klemens, was employed as a pilot by Northwest Airlines, Inc. (Northwest). He was a member of the Air Line Pilots Association, International (ALPA), the statutory exclusive collective bargaining agent for Northwest pilots. Since October 3, 1972, an "agency shop" agreement was in effect between Northwest and ALPA.
>
> n 1972 after the termination of a pilots' strike, a number of Northwest pilots with low seniority were not immediately recalled to active flying status. On October 6, 1972, the Northwest Master Executive Council (MEC) passed resolution 1-72, which authorized an assessment upon working Northwest pilots to pay a monthly benefit to the Northwest pilots who were not recalled.
>
> Mr. Klemens refused to pay the 1-72 assessment because it was levied only against Northwest pilots and not against the ALPA membership as a whole. However, Mr. Klemens continued to pay his regular membership dues to ALPA until October, 1975, when he was expelled from the union for failure to pay the 1-72 assessment.
>
> After his expulsion from ALPA, Mr. Klemens

> refused to pay the "service charge" (equivalent to dues) which is generally required from non-union employees under the "agency shop". He based his refusal upon Section 2, Eleventh, of the Railway Labor Act [45 U.S.C.A. § 152, Eleventh].
>
> By letter dated December 8, 1976, ALPA requested Northwest to discharge Mr. Klemens for delinquency in "service charge" obligations under the Union Security Agreement. When Northwest threatened to discharge Mr. Klemens, the latter paid his alleged deficiency to ALPA, whereupon the union withdrew its request for his discharge.
>
> On May 8, 1979, Mr. Klemens filed a Complaint seeking a declaratory judgment that he is not obligated to pay the ALPA "service charge" which he is currently rendering under protest. He is joined by pilots Hill, Maiers, and Giefer, who are similarly if not identically situated. . . . Their common claim is that their union membership was "terminated for [a] reason other than the failure . . . to tender the periodic dues, initiation fees, and assessments . . . uniformly required as a condition of acquiring or retaining membership." 45 U.S.C.A. § 152, Eleventh (a). Plaintiffs also argue that ALPA has breached its duty of fair representation. (484 F. Supp. at 187.)

ALPA moved to dismiss the complaint. This motion was denied as to the claim under the Railway Labor Act and granted as to the claim that ALPA had breached its duty of fair representation. 484 F. Supp. 186. Specifically the court held that "Plaintiffs have stated a cause of action under Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh." *Id.* at 188. ALPA answered the complaint and raised Section 101(a)(4) of the Labor Management Reporting and Disclosure Act as

a defense to the action. ALPA also initiated discovery to support this defense. Petitioners' motion to strike this defense and for a protective order was granted. 500 F. Supp. 735. The case proceeded to trial on stipulated facts and cross motions for summary judgment. The District Court ruled that:

> It is implicit in Section 2, Eleventh, that unions may only require payment of assessments which are legally authorized. On these facts, such an assessment must have complied with both the ALPA Constitution and any applicable federal labor statutes. When a pilot is expelled for failing to pay a union assessment, "service charges" may subsequently be required *only* if the assessment was legal in the first place.

The District Court determined that the assessment was not authorized by the ALPA Constitution and, therefore, that the Petitioners' expulsion from membership relieved them of the obligation to pay service fees to ALPA. The court entered judgment against ALPA in the amount of service fees paid since May 8, 1976, the period not barred by Washington's three year statute of limitations. The court also enjoined ALPA from requiring Petitioners to pay further agency shop fees to ALPA unless union membership is again tendered to them without further claims for the 1-72 assessment. 113 L.R.R.M. 2825.

ALPA appealed and the Ninth Circuit reversed, holding that the District Court did not have subject matter jurisdiction to consider whether the assessment was imposed in violation of ALPA's Constitution. 115 L.R.R.M. 3537. The Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*. On

June 26, 1984, the petition for rehearing was denied and the suggestion for rehearing *en banc* was rejected. Appendix, page 47a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

A. Denial of Individual Rights Granted By Statute Raises Important Questions Worthy Of Decision By This Court.

This Court has considered controversies arising under Section 2, Eleventh, of the RLA on several occasions. *Ellis v. Railway Clerks*, ____ U.S. ____, 104 S. Ct. 1883 (1984); *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113 (1963); *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959); *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). Collectively, these cases recognize that the scope of the provisions of this section raises substantive questions which are worthy of consideration by this Court. *E.g., Felter v. Southern Pacific Co., supra*, at 328.

Congress did not give unions unrestricted power to compel financial support from those persons whom they represent. *Ellis v. Railway Clerks, supra*, at 1893; *Brotherhood of Railway Clerks v. Allen, supra*, at 121, 122; *International Association of Machinists v. Street, supra*, at 768. Indeed the specific terms of the statute deny a union the right to such support from one whose

"membership was . . . terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required" for membership.

The District Court held that expulsion from membership for refusing to pay a levy not authorized by the ALPA's Constitution was a "reason other than" within the meaning of the statute. The Court of Appeals reversed, holding that the District Court had no jurisdiction to decide the question.

The correct breadth of the statute has never been decided by this Court. It is an important question, indeed an essential one, to the proper application of the statute. This Court has held that the term "dues" does not include exactions spent for political and ideological purposes not germane to collective bargaining, *Street* and *Allen*, or for the union's general litigation and organizing efforts, *Ellis*. And the Court has indicated that assessments for such purposes would not be authorized. *Railway Employes' Department v. Hanson, supra*, at 235. Given those interpretations, it strains credulity to believe that the Ninth Circuit was correct when it determined that a federal court lacks jurisdiction to investigate whether purported "assessments" are unauthorized by the ALPA's Constitution.

In enacting Section 2, Eleventh, Congress determined that financial support should not be required from those whose membership in a union was terminated for the wrong reason. It is inconceivable that a federal district court is without power to determine that particular union conduct is or is not a "reason other than" as that

term is used in the statute, simply because that conduct involves the interpretation and application of the union's constitution.

Union constitutions, after all, are contracts over which federal courts generally have jurisdiction. *See United Association of Journeymen v. Local 334*, 452 U.S. 615 (1981). And the provisions of a union's constitution are subject to examination and determination by a federal court. *International Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 245 (1971).

Under the RLA, the obligation of individual employees to provide financial support to a union is a federally created duty. But a corollary of this duty is the *federal right* not to provide that support under circumstances involving wrongful termination of membership by the union. Inescapably, whether such circumstances are present is also a federal question justiciable under 28 U.S.C. § 1337, even though the interpretation and application of the union's constitution is involved.

B. A Levy Not Authorized By The Union's Constitution Is A "Penalty" Under The Act.

The proviso to Section 2, Eleventh, states that a member expelled for nonpayment of "fines and penalties" is relieved of the obligation to provide financial support to the union. Neither the RLA nor its legislative history defines "penalties". The context in which the word is used makes it clear, however, that it refers to money claimed to be due by the union, and that it is something different from a "fine". Obviously, the term has some distinct and useful meaning; and a court's duty is to discover and give effect to the intent of Congress in

inserting that term in Section 2, Eleventh. For "courts should construe all legislative enactments to give them some meaning. . . ." *Rosado v. Wyman*, 397 U.S. 397, 415 (1970). If it is not a "penalty" to lose union membership for nonpayment of a purported financial obligation that was not even authorized by the union's constitution in the first instance, it is difficult to imagine any union conduct that would constitute a "penalty" within the meaning of the proviso.

To construe the statute in this fashion supports and furthers its basic purpose. In enacting Section 2, Eleventh, Congress sought to insure to unions the basic financial support they required to perform their statutory duties and, at the same time, to protect individual employees who were denied union membership for invidious reasons. If a demand for money is not authorized by the documents that govern the union-member relationship, it is plainly contrary to the purpose of the RLA to hold, as the Ninth Circuit in effect did, that federal law does not protect the individual employee from being discharged for refusing to pay such an illegal demand for financial support.

One of the principal purposes of the proviso to Section 2, Eleventh, is to protect individual rights. *Street, supra*, at 765-69. It enhances and furthers that purpose to interpret "penalties" as including financial demands prohibited by a union's constitution. To say that such illegal demands are beyond the reach of the federal courts guts the RLA of the protection Congress specifically provided for the individual employee. It was to stop just such overreaching by unions that Congress

included the phrase "fines and penalties" in Section 2, Eleventh.

Thus the extent of the protection provided by the proviso, and the jurisdiction of the federal courts thereover, is an important question of federal law which should be decided by this Court.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT ON PENDENT JURISDICTION

Even if the Ninth Circuit were correct in holding that the validity of the assessment under ALPA's Constitution was not a federal question under the RLA, it should have held that the District Court properly considered and decided the issue under the doctrine of pendent jurisdiction. Its refusal to do so flies in the face of numerous decisions of this Court establishing and applying that doctrine. *See, e.g. United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Pendent jurisdiction gives federal courts power to hear and determine state law issues. As this Court said in *Gibbs, supra*, at 725:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *," U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to

> confer subject matter jurisdiction on the court. Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 53 S. Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole. (Footnotes omitted.)

The justification for the doctrine lies in considerations of judicial economy, convenience and fairness to litigants. *Id.*, at 721. It is a common sense policy designed to conserve judicial energy and avoid multiplicity of litigation. *Rosado v. Wyman, supra*, at 405.

The exercise of jurisdiction is particularly appropriate here where the state-law claim, if it is such, is but one small part of the Petitioners' essentially federal case. Part I.B. of the Ninth Circuit's opinion makes it clear that both the state and federal claims have a common factual background. As the Fifth Circuit said in *Mobil Oil Corporation v. Kelley*, 493 F.2d 784, 788 (5th Cir. 1974):

> Decision has created an extension to the jurisdiction of federal courts to meet the needs of equity to litigants and judicial economy. Jurisdiction may be based on the assertion of a federal claim but the claimant may be unable to prove his allegations; the evidence may however prove a basis for relief under state law. In that event, a remedy may be granted by a federal court though a complaint based solely on the state claim would have been beyond the

> court's competency. Siler [v. Louisville & Nashville R. Co., 213 U.S. 175 (1909)], *supra*; Wright, Federal Courts, § 19; See also Moor v. County of Alameda, 1973, 411 U.S. 693, 93 S. Ct. 1785, 36 L.Ed.2d 596. Similarly, where the complaint itself alleges a claim with respect to which federal courts are given jurisdiction and, in addition, a claim based on state law arising out of a common nucleus of operative fact, the federal court may adjudicate both claims in a single proceeding without requiring the parties to present the same facts to two different courts. (Citations omitted).

Another reason for application of the doctrine here is that the relief sought by the Petitioners is entirely federal in nature. They seek a declaration that the RLA does not require them to pay agency-shop fees to ALPA under the circumstances presented. If the Petitioners are entitled to such federal-law relief, it is particularly appropriate that that relief be granted to them by a federal court.

Exercise of federal jurisdiction is also appropriate here because all of the Petitioners' claims arise from a common nucleus of operative fact and are such that the Petitioners would ordinarily be expected to try them all in one judicial proceeding. *See Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970).

The ultimate disposition of the Petitioners' federal claim is immaterial in determining whether it is sufficiently substantial for the purposes of jurisdiction over the state claim. *See Rumbaugh v. Winifrede R. Co.*, 331 F.2d 530 (4th Cir.), *cert. denied*, 379 U.S. 929 (1964). And continuation of federal jurisdiction over the state

claim is proper even though the federal claims might be decided adversely to the Petitioners. *See Mobil Oil Corporation v. Kelley, supra; Kavit v. A.L. Stamm & Co.*, 491 F.2d 1176 (2d Cir. 1974); *Ohio Hoist Manufacturing Co. v. LiRocchi*, 490 F.2d 105 (6th Cir. 1974). Moreover, continuation of federal jurisdiction is especially appropriate here, because the proceedings have already been lengthy and decision on the state law issue has already been made by the District Court. *See State of Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); and *see Transok Pipeline Co. v. Darks*, 565 F.2d 1150 (10th Cir. 1977) (after 4 years of litigation federal jurisdiction continues even though federal claims are settled shortly before trial).

The state and federal claims in this case derive from a common nucleus of operative fact. The federal issues presented are substantial and not frivolous. Therefore the District Court had jurisdiction to adjudicate all claims even though the basis for its ultimate decision was state law. *United Mine Workers v. Gibbs, supra*, at 725; *Klaus v. Hi-Shear Corporation*, 528 F.2d 225, 231 (9th Cir. 1975).

By failing to follow the applicable precedents of this Court, the Ninth Circuit has denied the Petitioners a decision in a federal forum which they are entitled to receive, and had already received from the District Court. Only this Court can require the Ninth Circuit to reinstate the decision that the precedents of this Court indicate rightfully is due the Petitioners.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas D. Klemens, *et al.*,
Plaintiffs-Appellees-Cross-Appellants

v.

Air Line Pilots Association, International,
Defendant-Appellant-Cross-Appellee.

Nos. 81-3657
81-3710
D.C. No. CV 79-587

OPINION

(Filed April 3, 1984)

Appeal from the United States District Court
for the Western District of Washington
Hon. Barbara J. Rothstein, District Judge, Presiding

Argued and Submitted: December 9, 1982

BEFORE: CHOY and FLETCHER, Circuit Judges,
and MacBRIDE,* District Judge.

FLETCHER, Circuit Judge:

Defendant Air Line Pilots Association (ALPA) appeals from a judgment in a suit brought by former ALPA members for a declaration freeing them from the obligation to pay service charges under an agency shop agree-

* The Honorable Thomas J. MacBride, Senior District Judge for the Eastern District of California, sitting by designation.

ment and reimbursement of service charges paid.

On cross-motions for summary judgment, the district court granted plaintiffs' motion. The court found that ALPA's insistence that plaintiffs pay service charges was illegal under section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh (1976).

I

BACKGROUND

A. *The Railway Labor Act.*

The purposes of the Railway Labor Act (RLA), originally enacted in 1926 and substantially revised in 1934, *see Felter v. Southern Pacific Co.*, 359 U.S. 326, 326 n.1 (1959), are, *inter alia*, to secure uninterrupted operations by commercial rail carriers, to protect the associational rights of the employees of such carriers, and to promote speedy settlement of labor disputes between the employees and the carriers. 45 U.S.C. § 151a (1976). Before 1951, the RLA prohibited carriers and labor organizations from making either union-shop or agency-shop[1] agreements. *Felter*, 359 U.S. at 330-33. In 1951, however, the RLA was amended to allow carriers and carrier employee unions to bargain for union or agency-shop clauses. This amendment enabled unions to be relieved of the burden of "free riders" (nonmembers who receive the benefits of the union's representation but do not support the union). *See* Act of Jan. 10, 1951, ch. 1220, 64 Stat.

[1] A union-shop clause requires employees to join the union; an agency shop clause requires nonmembers to pay a union service charge, equivalent to dues.

1238 (1951) (currently codified at 45 U.S.C. § 152, Eleventh (b) (1976)); *Felter*, 359 U.S. at 330-31. Subsequently, the Railway Labor Act, including the union security provision of section 2, Eleventh, was made applicable to air carriers. *See* 45 U.S.C. § 181 (1976).

Section 2, Eleventh (a) of the RLA, 45 U.S.C. § 152, Eleventh (a), provides that carriers and their unions may:

> make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment . . . with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

Although the statute explicitly authorizes only union-shop agreements, it also permits agency-shop agreements. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 741 (1963). Collective bargaining agreements may include an agency-shop clause requiring an expelled union member to pay service charges as a condition of continued employment if the former member is expelled for not paying "the periodic dues, initiation fees, and assessments . . . uniformly required" for membership. The charges cannot be demanded of an employee denied union membership or terminated from membership for any other reason. *See Local 1104, Communications Workers of America v. NLRB*, 520 F.2d 411, 416 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

B. *Facts.*

In 1972, plaintiffs Klemens, Hill, Geifer and Maiers were employed as pilots by Northwest Airlines, Inc. They were also members of ALPA. At that time, the collective bargaining agreement between Northwest and ALPA included an agency-shop clause proper under section 2, Eleventh of the RLA. Following a 1972 strike at Northwest, ALPA imposed on those pilots who had returned to work a special one-time assessment (the I-72 assessment) to pay continuing benefits to Northwest pilots with low seniority who had participated in the strike but had not yet been called back to work. Plaintiffs refused to pay the special assessment and unsuccessfully challenged its legality before the ALPA appeals board. Although their appeal was rejected, plaintiffs continued to refuse to pay the I-72 assessment. They did not, however, attempt any further legal challenge to the assessment. ALPA subsequently expelled plaintiffs for their refusal to pay.[2]

After their expulsion, ALPA informed plaintiffs that under the union security clause, they were obligated to continue paying the equivalent of union dues or face termination from employment. In the period immediately following their expulsion, plaintiffs refused to pay the agency-shop fees demanded by the union. ALPA requested Northwest Airlines to discharge plaintiffs in compliance with the agency-shop clause. Plaintiffs subsequently paid the delinquent service fees and ALPA

[2] Plaintiff Dearing was expelled from ALPA for refusing to return an alleged over-payment of strike benefits. Because his case differs substantially from that of the other plaintiffs, it will be discussed separately below.

withdrew its request. Plaintiffs have continued to pay fees under protest.

C. *Procedural History.*

On May 8, 1979, plaintiffs filed suit in federal district court seeking a declaratory judgment that they could not be required, consistently with the provisions of section 2, Eleventh of the Railway Labor Act, to pay the disputed service charges. The pilots argued that their expulsion from ALPA for failure to pay the special Northwest strike assessment was not an expulsion for failure to pay the "periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required" for union membership. Hence, under section 2, Eleventh, they could no longer be required to pay union support or service charges. The complaint further alleged that the procedure by which ALPA had imposed the I-72 assessment violated its constitution and section 101(a)(3) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(3) (LMRDA).

The district court denied ALPA's motion to dismiss the complaint for lack of jurisdiction, holding that exhaustion of grievance procedures was not required and that the complaint stated a cause of action against the union for violation of section 2, Eleventh of the RLA. *Klemens v. Air Line Pilots Association, International*, 484 F. Supp. 186, 188, 189 (W.D. Wash. 1980).[3] Follow-

[3] In this initial decision, the district court also granted summary judgment to ALPA on the plaintiffs' breach of duty of fair representation claim. *Klemens v. Air Line Pilots Association, International*, 484 F. Supp. at 190. The plaintiffs do not appeal from the dismissal of this claim.

ing this decision, the parties entered into a joint stipulation of facts, and submitted the case to the court on cross-motions for summary judgment.

The district court held, in an unpublished opinion, that the action was not barred by the statute of limitation. It agreed with the defendants that the calculation of payments under the I-72 assessment on the basis of a percentage of each pilot's salary did not violate section 2, Eleventh's uniformity requirement and that the assessment was not a penalty. It also agreed that the statute does not require that assessments be periodic. It determined, however, that the procedure by which the I-72 assessment was authorized was not legal under the ALPA constitution. Consequently, the court ruled that under section 2, Eleventh, plaintiffs' expulsion from ALPA for failure to pay the I-72 assessment relieved them of any obligation to pay the equivalent of union dues. The district court, therefore, ordered ALPA to return to plaintiffs all service charges that they had been required to pay within three years of filing their complaint. The court did not decide two other issues raised by plaintiffs: whether the assessment was not "uniformly required" because only Northwest pilots had to pay it and whether the assessment violated the LMRDA.

ALPA appeals from the district court's ruling that plaintiffs are no longer required to pay service charges under the agency-shop agreement. The plaintiffs cross-appeal from the district court's ruling on some of their challenges to the assessment under the RLA.

II

DISCUSSION

ALPA contends that the district court lacked subject matter jurisdiction and that the statute of limitation has run on plaintiffs' claims. It also challenges the district court's decision on the merits. Because we conclude the district court erred in finding that a claim under section 2, Eleventh, could be based on the imposition of an assessment in violation of the union's constitution and by-laws, we reverse and remand for determination of issues not yet reached by the district court.

A. *Plaintiffs' Cause of Action Under the RLA.*

The district court held that it had jurisdiction under 28 U.S.C. § 1337 (1976), which grants jurisdiction to federal district courts over actions arising "under any Act of Congress regulating commerce . . . ." The court held that section 1337 gave it jurisdiction because plaintifffs had stated a cause of action arising under section 2, Eleventh of the Railway Labor Act. ALPA argues that, for a number of reasons, this case does not present a controversy justiciable in the federal courts. We affirm the district court on this issue, finding that Congress intended to create a cause of action against unions under section 2, Eleventh in cases such as this, and that the federal court is the appropriate forum for resolution of the controversy.

Plaintiffs point out that actions against unions for improper enforcement of union security agreements are properly heard in federal courts in cases governed by the

National Labor Relations Act (NLRA). *See, e.g., Local 1104, Communications Workers of America v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). This may be a starting point, but it does not necessarily follow that such a case states a claim under the RLA.

The NLRA and the RLA are fundamentally different. Section 8(b)(2) of the NLRA makes it an unfair labor practice for a union to attempt to cause an employer to discharge an employee under a union security agreement or to otherwise discriminate against an employee who has been expelled from the union for a reason other than failure to pay uniformly required dues. 29 U.S.C. § 158(b)(2). Thus, had this action been governed by the NLRA, plaintiffs could have brought unfair labor practice charges against ALPA. *See Local 1104*, 520 F.2d at 313; *NLRB v. Hershey Foods Corp.*, 513 F.2d 1083 (9th Cir. 1975).

The RLA, however, contains no similar provision making such union practices unlawful. Section 2, Eleventh allows union security agreements to be included in collective bargaining agreements provided that they do not require union membership as a condition of employment with respect to employees to whom membership has been denied for a reason other than failure to pay uniformly required dues and assessments. Agreements, or specific applications of agreements, that are inconsistent with this proviso are made unlawful only by section 2, Fifth, which prohibits an *employer* from conditioning employment on union membership except as allowed by section 2, Eleventh. Nothing in these provisions explicitly makes any union practice unlawful or

creates a cause of action against a union.

Nevertheless, we conclude that in enacting section 2, Eleventh, Congress intended to create a cause of action against unions that attempt to enforce agency shop agreements in a manner inconsistent with the section 2, Eleventh proviso. Two other circuits have so held.

In *Bagnall v. Air Line Pilots Association, International*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981), a case similar to this one, the Fourth Circuit allowed an employee to sue its union for a violation of section 2, Eleventh, to recover service charges paid under an agency shop agreement. The Third Circuit has held, as an alternative ground for decision, that "in suits involving section 2 [, Eleventh] unions should be held liable for their actions in procuring a discharge which violates the employee['s] statutory rights." *Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 102 (3d Cir. 1968) (footnote omitted) (employee discharged after refusing to pay back dues and reinstatement fee), *cert. denied*, 393 U.S. 1048 (1969).

We do not believe Congress intended to deny employees the right to hold their unions to the standard established in section 2, Eleventh. In making union security agreements lawful, Congress created an exception to section 2, Fifth's prohibition against employer coercion of union membership, and explicitly overrode state "right to work" laws prohibiting such agreements.[4] By the exception, Congress made it possible for unions to achieve a

[4] The section applies "Notwithstanding . . . any other statute or law . . . of any state . . . ." 45 U.S.C. § 152, Eleventh.

great deal of power over employees: the power to cause their discharge. Congress was concerned about unions' abuse of this power, and enacted the proviso specifically to prevent it. The report of the Senate Committee on Labor and Public Welfare demonstrates this:

> Your Committee desires to make it clear that the proviso clauses in paragraph eleventh(a) are designed to protect . . . employees [who are denied membership in a labor organization] . . . [I]f membership is denied or if an employee is expelled from membership for any reason other than his failure to tender the uniformly required periodic dues, initiation fees, and assessments, he cannot be required to relinquish his job because of his failure to join or remain a member of a labor organization.

S. Rep. No. 2262, 81st Cong., 2d Sess., *reprinted in* 1950 U.S. Code Cong. & Admin. News 4319, 4321-22.

The Supreme Court, in *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), held that a union has a duty under the RLA to represent all employees fairly. The Court reasoned that in conferring on unions the power to act as the exclusive representative of all employees, Congress must have intended that they have a corresponding duty to protect the interests of those employees. 323 U.S. at 202. In finding that section 2, Eleventh gives unions the duty to exercise their power of discharge under union security agreements only in a manner consistent with the statute, we adopt a similar approach.

ALPA argues that this dispute cannot be resolved in federal court because an adequate remedy is provided in

the collective bargaining agreement. Under the agreement, an employee may not be discharged under the agency shop clause unless the issue has been determined by a neutral arbitrator. The decision of the arbitrator is final: if the employee loses, he is discharged.

We agree with the Fourth Circuit that for an employee who does not want to risk discharge, "such a remedy is tantamount to no remedy at all." *Bagnall*, 626 F.2d at 342. We recognize that parties may, in a collective bargaining agreement, waive their rights to a judicial remedy. However, we do not find such a waiver here. The arbitration procedures in the contract apply only to employees who are threatened with discharge. Because plaintiffs have continued to pay service charges, they are in no position to invoke the arbitration remedy.

We recognize that in many areas Congress has left the resolution of railway labor disputes to the machinery of arbitration, mediation, and bargaining. Unless Congress intends the right it has created to be enforceable in the courts, they have no jurisdiction to resolve disputes. *See, e.g., Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943) (courts may not review Mediation Board's choice of bargaining representative); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943) (same); *Fechtelkotter v. Airline Pilots Association, International*, 693 F.2d 899 (9th Cir. 1982) (courts lack jurisdiction over action by employees against union for alleged violation of agreement with employer). Courts must "defer to the dispute settlement procedures of the Act." *Fechtelkotter*, 693 F.2d at 901. However, disputes between a union and employees cannot be resolved by

adjustment boards, which were established by the RLA to resolve grievances between employers and employees. *See* 45 U.S.C. § 153, First(i) (1976); *Steele*, 323 U.S. at 205. Where, as in this case, the statute creates a right but does not provide an adequate enforcement mechanism, we may conclude that the right is enforceable in federal court. "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." *Switchmen's Union*, 320 U.S. at 300. *See Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937) (courts may enforce RLA's requirement that employer bargain with employee representative); *Texas & New Orleans Railroad Co. v. Brotherhood of Railway & Steamship Clerks*, 281 U.S. 548 (1930) (courts may enforce right under RLA to be free from coercion in organization and choice of bargaining representative).

B. *Propriety of the I-72 Assessment Under the Union's Constitution.*

Although plaintiffs present a claim for violation of the RLA over which the district court has jurisdiction under § 1337, we do not believe that jurisdiction encompasses their claim that the I-72 assessment is improper under the union's constitution and by-laws. The district court found that "[i]t is implicit in Section 2, Eleventh, that unions may only require payment of assessments which are legally authorized." We do not agree insofar as the legality referred to means conformity with the union's internal rules. There is nothing in the language or legislative history that suggests that in enacting § 2, Eleventh,

Congress intended to regulate the conduct of unions' internal affairs. Congress was concerned only that unions not use the mechanism of the union security clause to discriminate against some members or to enforce financial obligations (such as fines and penalties) other than uniformly required "periodic dues, initiation fees, and assessments. . . ." 45 U.S.C. § 152, Eleventh. We find no basis for the claim that requiring service charges for an employee expelled from the union for refusing to pay an assessment not imposed in conformity with internal union procedures violates section 2, Eleventh. Therefore, we must reverse the district court's decision on this issue.[5]

Such a claim may indeed constitute a breach of contract justiciable under state law, but absent implication of a statutory right, the district court has no basis for jurisdiction under the RLA. *See Fechtelkotter*, 693 F.2d at 902. Plaintiffs argue that the imposition of the assessment violated the LMRDA. Because the district court did not reach this issue, we decline to do so and remand for consideration of this argument.

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[5] Our decision is not in conflict with *Bagnall*, 626 F.2d at 340-42, which, in a suit against a union alleging violation of section 2, Eleventh, determined that the union's attempt to collect a finance charge on nonmembers' monthly service charge payments was not authorized under the collective bargaining agreement's agency shop clause. Section 2, Eleventh, enables unions to obtain financial support from all employees in the bargaining unit, but they may do so only pursuant to a collective bargaining agreement. Were an employer to discharge an employee for failure to pay union fees that were not authorized under the collective bargaining agreement, it would violate section 2, Fourth, which prohibits an employer from assisting in the collection of union dues except as otherwise authorized by the RLA. These provisions demonstrate that the statute is intended to prevent collection of union fees under threat of discharge unless authorized by the collective bargaining agreement.

C. *The I-72 Assessments Under Section 2, Eleventh.*

Plaintiffs challenge the district court's decision that the I-72 assessment was "uniformly required," within the meaning of section 2, Eleventh, even though, because it was based on percentage of salary, each pilot was required to pay a different amount. The district court relied on *Bagnall v. A.L.P.A.*, 626 F.2d 336 (4th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981), which held that union dues based on a percentage of earnings were "uniformly required" under section 2, Eleventh, noting that the statute prescribes "uniformity" not "equality." 626 F.2d at 339. That court held, and we agree, that the uniformity requirement was designed to prevent discrimination. The purpose is not violated when the imposition of charges is based on a reasonable non-discriminatory classification. It is certainly reasonable for a union to base dues or assessments on ability to pay. Cases decided under the NLRA, which also contains a uniformity requirement for dues enforced under a union security clause, are consistent with this approach. *See Aluminum Workers Trade Council*, 185 NLRB 69 (1970); *Stage Employees of Motion Picture Machine Operators Union*, 140 NLRB 74 (1963); *see also Schwartz v. Associated Musicians of Greater New York, Local 802*, 340 F.2d 228 (2d Cir. 1964). We affirm the district court's decision on this issue.

We also find no merit in plaintiffs' challenge to the district court's findings that section 2, Eleventh, by its terms, does not require that assessments be periodic, and that they had failed to show the I-72 assessment was a penalty. We do not address plaintiffs' contention that the assessment was not "uniformly required" because it

was imposed only on Northwest pilots, which was not decided by the court below. The district court may consider the issue on remand.

D. *The Statute of Limitation.*

The district court ruled that a three year statute of limitation was applicable to the plaintiffs' claim under the Railway Labor Act.[6] The parties do not contest this conclusion.[7] The district court held that even though plaintiffs did not file suit until more than three years after their expulsion from ALPA, their claims were not barred. The district court reasoned that the claim for violation of section 2, Eleventh was based on the imposition of service charges, not on the expulsion from ALPA. These charges were imposed within the limitation period.

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[6] Plaintiffs argue that ALPA waived the statute of limitation defense by failing to raise it below. We reject this argument. ALPA raised the statute of limitation defense in its memorandum in support of its motion for summary judgment, and the district court ruled on it. A statute of limitation defense may be raised in a motion for summary judgment, *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980), and the district court in this case clearly ruled on the statute of limitation as it applied to the RLA. Thus, even though ALPA failed to raise the defense in its answer or to include it as an issue in the stipulated pretrial order, plaintiffs are not prejudiced by our consideration of the statute of limitation issue, and ALPA properly can appeal from the district court's ruling on this issue. *See Glaziers & Glassworkers Local 767 v. Custom Auto Glass Distributors*, 689 F.2d 1339, 1342 n.1 (9th Cir. 1982).

[7] Because the parties do not appeal this ruling, we do not decide whether the Supreme Court's decision in *Del Costello v. Teamsters*, 103 S. Ct. 2281 (1983), requires that a six-month limitation period be applied in actions under the RLA. In any case, this circuit has declined to apply *Del Costello* retroactively. *See Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, 44 Sup.Ct. Bull. (CCH) B1715 (1984).

In order to apply the three-year statute of limitation to this case, we must determine when plaintiffs' alleged cause of action under the RLA accrued. For this we look to federal law. *Archer v. Airline Pilots Association. International*, 609 F.2d 934, 937 (9th Cir. 1979), *cert. denied*, 446 U.S. 953 (1980). *See also Chung v. Pomona Valley Community Hospital*, 667 F.2d 788 (9th Cir. 1982). ALPA argues vigorously that, under federal law, the plaintiffs' cause of action accrued, and the statute of limitation began to run, no later than their expulsion from ALPA. The last such expulsion occurred on March 17, 1976, more than three years before the plaintiffs commenced the instant federal suit on May 8, 1979. To support its argument that under federal law plaintiffs' complaint is time-barred, ALPA cites *Local Lodge 1424, International Association of Machinists v. NLRB*, 362 U.S. 411 (1960) *(Bryan Manufacturing)*. *Bryan Manufacturing* involved application of section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), to an unfair labor practice charge. Section 10(b) precludes review of a complaint based on an unfair labor practice occurring more than six months prior to the filing of the charge. In *Bryan Manufacturing*, the union committed an unfair labor practice by entering into a collective bargaining agreement that contained a union security clause at a time when the union did not represent a majority of the employees. 362 U.S. at 412-13. More than six months after execution of the collective bargaining agreement, an employee filed an unfair labor practice charge challenging the continued enforcement of the union security clause. The Supreme Court found that the charge was time-barred because enforcement of the union security clause by itself was permissible. *Id.* at 417. The enforcement could be rendered invalid only by

resurrecting a time-barred charge, *i.e.*, execution of the collective bargaining agreement with a security clause at a time when the union did not have majority status. To convert enforcement of a collective bargaining agreement, perfectly lawful on its face, to an unfair labor practice by reference to an event that, because of a time limitation, could not be the subject of an unfair labor practice complaint, would have vitiated the policies underlying the six-month limitation. *Id.* at 419. Thus, although enforcement of the agreement continued, it was not a "continuing violation" because the initial execution of the agreement was illegal and challenge to that execution was time barred.

This court's 1977 decision in *NLRB v. Local 30, International Longshoremen's & Warehousemen's Union, 549 F.2d 698 (9th Cir. 1977),* interprets *Bryan Manufacturing* to mean that the six-month time period for filing an unfair labor practice charge under section 10(b) begins to run when "the laborer [is] in a position to file the unfair labor practice charge, *i.e.*, upon receipt of the notice of the penalty." *Id.* at 701 (citing and discussing *Bryan Manufacturing*). We elaborated on this rule of accrual in *NLRB v. California School of Professional Psychology*, 583 F.2d 1099 (9th Cir. 1978), where we stated that "the time limit of § 10(b) should begin running when the employee can first file an unfair labor practice charge to protect his interests." *Id.* at 1101. A similar rule is appropriate here.

Our analysis of the cause of action under section 2, Eleventh, makes clear that plaintiffs' cause of action did not accrue until the union attempted to enforce the agency-shop clause against them. The imposition of an

assessment and the expulsion from union membership are not themselves actionable under section 2, Eleventh. The statute regulates only the use of the union security agreement to cause discharge or enforce service fees. Because ALPA's attempts to enforce the agency-shop clause occurred during the three years prior to the filing of this action, plaintiffs' claim under the RLA is not time barred.[8]

III

PLAINTIFF DEARING'S CLAIMS

Unlike the other plaintiffs, Dearing does not base his claim on the I-72 assessment. His case centers around his refusal to return to ALPA an overpayment of strike benefits.

When ALPA demanded return of the overpayment, Dearing refused and tendered his resignation. ALPA, however, declined to accept the resignation and continued to press its claim. When Dearing again refused to pay, ALPA expelled him from the union. The district court found that under section 2, Eleventh, the union could not force Dearing to pay service charges because he had been expelled for a reason other than failure to

[8] We note that application of the statute of limitation to a claim challenging the legality of the assessment itself or of plaintiffs' expulsion from the union on a theory other than violation of section 2, Eleventh, could result in a different outcome. The assessment and expulsion occurred more than three years before the filing of this suit, and the current obligation to pay dues may be merely a continuing effect of the prior improper act, as in *Bryan*. On remand, the district court may consider whether plaintiffs' remaining claims are barred by the statute of limitation.

pay dues and assessments. It awarded damages to Dearing, reduced by the amount of unreturned strike benefits for which ALPA had counterclaimed.

On appeal, ALPA does not challenge the conclusion that if ALPA expelled Dearing for refusal to repay the benefits it lost the right to demand service charges. However, it argues that Dearing resigned voluntarily and therefore cannot claim any protection under section 2, Eleventh.

The district court found that ALPA had declined to accept Dearing's resignation, and elected to expel him instead. This is a factual conclusion. On reviewing the evidence, we do not find it clearly erroneous. *See* Fed. R. Civ. P. 52(a). Therefore, the district court did not err in awarding Dearing reimbursement of his service charges.

Dearing challenges the district court's award to ALPA on its counterclaim on two grounds. First, he contends the counterclaim is barred by the statute of limitations. The district court held that because ALPA's claim arose out of the same transaction as Dearing's claim, it was not time barred. We agree. A claim for recoupment that would otherwise be barred by the statute of limitation may be brought to defeat a claim arising out of the same transaction. *See* 3 J. Moore, *Moore's Federal Practice* § 13.11 (2d ed. 1983). ALPA's counterclaim arises out of the same transaction as does Dearing's claim.

Second, Dearing argues that under the ALPA constitution, expulsion or suspension is the union's exclusive remedy against a member who fails to meet his or her

financial obligations. In *United Glass Workers' Local 188 v. Seitz*, 65 Wash. 2d 640, 399 P.2d 74 (1965), the Washington Supreme Court rejected a union's civil action for payment of a fine. The court found that the union constitution provided for expulsion or suspension as the exclusive remedy for failure to pay fines. *Id.* at 642, 399 P.2d at 75. The court premised its conclusion on the principle that "when parties to a contract foresee a condition which may develop and provide in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy. . . ." *Id.*

Even were we to agree with the reasoning of *Seitz*, it is not applicable to this case. The ALPA constitution provides expulsion as the remedy for any member's failure to pay "his dues, dues adjustment, assessment, monetary fines, arrangement plan obligations, or any applicable finance charge thereon. . . ." It does not mention the mistaken overpayment of strike benefits. Rather, it is concerned with ensuring the collection of ordinary union revenue and enforcing union penal measures. The contract does not limit ALPA's remedies for recouping the overpaid strike benefits.

CONCLUSION

The judgment in favor of plaintiff Dearing is AFFIRMED. The judgment in favor of the other plaintiffs is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas D. Klemens, Colin F. Dearing, Thomas G. Giefer, Roy A. C. Hill, Robert G. Maiers,
Plaintiffs,

vs.

Air Line Pilots Association, International,
Defendant.

No. C79-587S

ORDER ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

(Filed February 24, 1981)

THIS CAUSE comes before the Court on the above-captioned Motions, argued on February 13, 1981. After reviewing the Motions, memoranda, and other pleadings herein, and being fully advised, the Court rules as follows:

BACKGROUND FACTS

All parties agree that the material facts in this lawsuit are not in dispute. Therefore, the case is appropriate for adjudication by summary judgment. Rule 56, Fed. R. Civ. P.

Since 1972, an agency shop agreement has been in effect between Northwest Airlines, Inc. (Northwest) and

the Air Line Pilots Association, International (ALPA). Under this agreement, ALPA is the exclusive collective bargaining agent for Northwest pilots.

In 1972, the Northwest pilots went on strike. ALPA assessed its entire membership to pay strike benefits. When the strike ended, a number of pilots with low seniority were not immediately recalled to active flying status. On October 6, 1972, the Northwest Master Executive Council (MEC) passed Resolution 1-72. Pursuant thereto, working Northwest pilots were assessed to pay a supplemental monthly benefit to the pilots who had not been recalled.

Plaintiffs Klemens, Giefer, Hill, and Maiers were pilots who refused to pay the 1-72 assessment, which they contend was illegally imposed. All four pilots were consequently expelled from ALPA. *See* Exhibits E-4, F-1, F-2, and F-3 to Joint Stipulation, filed April 22, 1980 (hereinafter "Joint Stipulation"). They have subsequently continued to pay agency shop "service charges", but they have done so under protest. Plaintiffs now claim relief from these union payments under Section 2, Eleventh, of the Railway Labor Act.

Plaintiff Dearing was also a Northwest pilot in 1972. During the strike, he received strike benefits from ALPA. The union now claims that most of those benefits were paid under a "mistaken assumption". *See* defendant's Memorandum, filed January 12, 1981, at p. 4. When ALPA demanded return of $675.00, Mr. Dearing refused and tendered his resignation. *See* Exhibit B-5 to Joint Stipulation. The union, however, declined to accept the resignation and continued to press

its claim for $675.00. When Mr. Dearing again refused to pay, ALPA issued a Notice of Impending Expulsion. Exhibit B-10 to Joint Stipulation. On March 17, 1976, Mr. Dearing was formally expelled for his failure to return the strike benefits. *See* Exhibit B-12 to Joint Stipulation. Like the other plaintiffs, Mr. Dearing claims that the circumstances of his expulsion from ALPA should relieve him of any subsequent obligation to pay agency shop fees. He, too, relies upon Section 2, Eleventh, of the Railway Labor Act.

Section 2, Eleventh was primarily designed to assure that every worker in a bargaining unit would pay his or her fair share in the costs of collective bargaining. It was intended to combat the perceived problem of "free riders". At the same time, however, the statute contains an important limitation on a union's power to require membership (or its equivalent) as a condition of employment:

> *Provided*, That no such [union security] agreement shall require such condition of employment with respect to...employees to whom membership was ...terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

45 U.S.C. § 152, Eleventh(a). Plaintiffs here do not challenge their expulsion from ALPA. The issue is whether the union may thereafter demand from them the equivalent of membership dues.

By their Complaint, plaintiffs seek to recover the "service charges" paid under protest since the time of their expulsion. By its Counterclaim, ALPA seeks to recover $675.00 of "unreturned strike benefits" from Mr. Dearing. *See* Joint Stipulation, at p. 3.

PLAINTIFFS' CHALLENGES UNDER LANGUAGE OF THE PROVISO

Plaintiffs assert, on a variety of grounds, that their union membership was terminated for reasons other than their failure to tender the "periodic dues, initiation fees, and assessments uniformly required".

Plaintiffs suggest that only periodic assessments are permitted under Section 2, Eleventh. The union correctly responds that this interpretion of the statute is unreasonable. *See* defendant's Memorandum, filed January 12, 1981, at p. 16. In Section 2, Eleventh, the word "periodic" modifies the word "dues", not the word "assessments".

The 1-72 assessment, like ALPA's periodic dues, was calculated as a percentage of each pilot's salary. Pilots with different salaries paid differing amounts of the assessment. The percentage, however, was constant. Plaintiffs argue from this that the assessment was not "uniformly required" from the pilots. A similar issue was recently addressed by the Fourth Circuit in *Bagnall v. ALPA*, 626 F.2d 336, 339 (4th Cir. 1980). There, the court observed properly that the Railway Labor Act requires only uniformity, not equality. By this standard, ALPA must be held to have used a reasonable classifica-

tion when it based the 1-72 assessment on a uniform percentage of each pilot's earnings.

Plaintiffs have failed to produce any legal support for their argument that 1-72 constituted a "penalty" under Section 2, Eleventh.

THE CASE OF MR. DEARING

Under ALPA's Constitution, a member's voluntary resignation was only effective if he had fully paid all outstanding obligations to the union. *See* Article II, Section 8 of Exhibit H-2 to the Joint Stipulation. For this reason, ALPA properly refused to accept Mr. Dearing's tender of resignation.

The union could then have proceeded through available adjudicative remedies to recover its strike payments. Instead, however, ALPA elected to expel Mr. Dearing from its membership. The union is now estopped from denying the fact of expulsion, and it must face whatever legal consequences may follow.

It is further apparent that ALPA's claim against Mr. Dearing cannot reasonably be characterized as one for "periodic dues, initiation fees, or assessments". It follows under Section 2, Eleventh, that Mr. Dearing's expulsion relieved him of any subsequent obligation to pay agency shop "service charges" to the union.

As to ALPA's Counterclaim, Mr. Dearing does not deny that he received $675.00 in strike benefits by mistake. Rather, he contends that the Counterclaim is

barred by the applicable statute of limitations in Washington. Had the union brought its counterclaim as an independent action, it would certainly be barred by the passage of time. As a counterclaim, however, it arises directly from the same facts upon which plaintiffs bring suit. ALPA is accordingly entitled to raise its demand for $675.00 by way of recoupment against any judgment in favor of Mr. Dearing. ALPA's counterclaim against Mr. Dearing is not barred as long as Mr. Dearing's own action is not barred. *See generally* 3 *Moore's Federal Practice* § 13.11 at p. 13-245.

VIOLATION OF ALPA'S 1972 CONSTITUTION

It is implicit in Section 2, Eleventh, that unions may only require payment of assessments which are legally authorized. On these facts, such an assessment must have complied with both the ALPA Constitution and any applicable federal labor statutes. When a pilot is expelled for failing to pay a union assessment, "service charges" may subsequently be required *only* if the assessment was legal in the first place.

Plaintiffs allege at least three legal defects in the 1-72 assessment by which Section 2, Eleventh should relieve them from agency shop fees. First, they say that 1-72 violated the 1972 ALPA Constitution and Bylaws. Second, they say it failed to meet the uniformity requirements of Section 2, Eleventh, because only Northwest pilots were assessed. Third, plaintiffs contend that 1-72 violated section 101(a)(3) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411 (a)(3).

At least two ALPA Appeal Boards have adjudicated challenges to "special benefit" assessments purportedly authorized under the ALPA Constitution by the Northwest MEC. In 1974, one Board upheld the 1-72 assessment under Article IX, Section 7(C) of the 1972 ALPA Constitution. *See* Exhibit D-2 to Joint Stipulation. In 1977, however, another Board struck down the same kind of assessment in the *O'Neill* case. *See* Exhibit H-1 to Joint Stipulation.

On balance, the Court finds *O'Neill* to be the better reasoned of the two Appeal Board decisions. There, the majority said that:

> ...the authority to levy assessments for special benefit purposes is an exception to the authorities granted to LECs and MECs under Article IX, Section 7 B and C of the Constitution and By Laws.

Id., at p. 2. Indeed, Article IX, Section 7(A)(3) expressly sets forth two alternative methods for authorizing such an assessment. It must be approved either by ALPA's Board of Directors or by a two-thirds' secret vote "of the entire active membership in good standing". This Court finds that those two alternative procedures were intended as the exclusive means for authorizing a "special benefit" assessment. If MEC's were intended to share this authority, the 1972 ALPA Constitution should have said so.

There is no dispute but that 1-72 was a "special benefit" assessment. Nor does defendant claim that the Northwest MEC complied with either procedure under

Article IX, Section 7(A)(3). It follows that the 1-72 assessment was not legally authorized under the ALPA Constitution. It further follows that any pilot expelled for refusing to pay that assessment was entitled to recover any agency shop "service charges" thereafter required by the union. 45 U.S.C. § 152, Eleventh.

It is no defense that ALPA may subsequently have amended its Constitution to permit an MEC to authorize "special benefit" assessments. This case and plaintiffs' rights must be determined as of the time when 1-72 was imposed.

Having reached this conclusion under the 1972 ALPA Constitution and Bylaws, it is unnecessary to address plaintiffs' other claim under Section 2, Eleventh, or their claim under the LMRDA.

STATUTE OF LIMITATIONS ON PLAINTIFFS' CLAIMS

Defendant contends that plaintiffs' claims are "plainly brought too late". Defendant's Memorandum, filed January 12, 1981, at p. 20. It cites a case from this District to the effect that LMRDA claims are barred after three years under Washington law. *See Mitchell v. Local 46*, 100 LRRM 2935, 2936 (W.D. Wa. 1979). ALPA suggests that "plaintiffs' claims accrued no later than September 1974," when the union's Appeal Board upheld the 1-72 assessment. Defendant's Memorandum, at p. 20.

Plaintiffs' principal claim, however, is for relief from union "service charges". ALPA has required payment of

these charges periodically over the years since plaintiffs' expulsion. Even if the wrongful imposition of 1-72 took place outside the limitations period, plaintiffs' cause of action could accrue thereafter, as the requirement of agency fees continued. *Cf. In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir. 1979).

Plaintiffs suggest that this action is based on a written contract. There is of course no question but that written documents provide an important basis for adjudicating this case. A pilot's obligation to pay ALPA "service charges" arises under the written union security agreement. *See* Exhibit A to Joint Stipulation. The procedures for authorizing "special benefit" assessments are specified in ALPA's written Constitution. Plaintiffs' Complaint, however, invokes federal court jurisdiction by a claim of *statutory* right. *See, e.g.*, Order of February 12, 1980, reprinted at 484 F. Supp. 186. Plaintiffs' claim for relief from ALPA "service charges" does not arise from a written contract, but rather under Section 2, Eleventh, of the Railway Labor Act. That Act contains no statute of limitations, so this case is governed by the applicable period under Washington law. The State of Washington has no statute of limitations specifically applicable to actions for liability created by statute. *See Mitchell v. Local 46*, 100 LRRM 2935, 2936 (W.D. Wa. 1979). Following this Court's previous ruling in *Mitchell*, however, it is appropriate to apply the three-year statute of limitations under RCW 4.16.080(2) (governing actions for injuries to "rights of another not herein enumerated").

The Complaint in this case was filed on May 8, 1979.

Plaintiffs accordingly are entitled to claim for recovery of any "service charges" paid during the three years immediately preceding the Complaint (or subsequently). Any action to recover such payments made before May 8, 1976, however, is barred.

CONCLUSION

Plaintiffs are entitled to a judgment in the amount of any agency shop "service charges" paid to ALPA on or since May 8, 1976. ALPA, however, is entitled to reduce Mr. Dearing's judgment by way of recoupment in the amount of $675.00.

Within twenty (20) days from the date of this Order, plaintiffs are directed to file an affidavit showing the amount of "service charges" paid on or since May 8, 1976. A Judgment will thereafter issue accordingly.

It is further ORDERED that unless union membership is again tendered to plaintiffs (without further claims for the 1-72 assessment or rebate of strike benefits) ALPA is herewith enjoined from requiring plaintiffs to pay any future agency shop fees.

IT IS SO ORDERED.

The Clerk of this Court is directed to mail uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 24th day of February, 1981.

/s/ Barbara J. Rothstein
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas D. Klemens, Colin F. Dearing, Thomas G. Giefer, Roy A. C. Hill, Robert G. Maiers,
Plaintiffs,

vs.

Air Line Pilots Association, International,
Defendant.

No. C79-587S

ORDER ON PLAINTIFFS' MOTION TO STRIKE AND MOTION FOR PROTECTIVE ORDER

(Filed October 31, 1980)

THIS CAUSE comes before the Court on plaintiffs' Motion to Strike and Motion for Protective Order. After reviewing the Motions, memoranda, and other pleadings herein, and being fully advised, the Court rules as follows:

Since 1972, an agency shop agreement has been in effect between Northwest Airlines, Inc. (Northwest) and the Air Line Pilots Association, International (ALPA). Under this agreement, ALPA is the exclusive collective bargaining agent for Northwest pilots.

This is an action by five Northwest pilots who were expelled from ALPA. They claim that the circumstances of their expulsion should relieve them of any subsequent

duty to pay agency shop "service charges".

The Court has previously ruled that plaintiffs have stated a proper cause of action under section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh. *See* Order of February 12, 1980, reprinted at 484 F. Supp. 186.

Plaintiffs are represented in this action by counsel from the National Right to Work Legal Defense and Education Foundation, Inc. (NRWF), a non-profit foundation which provides legal aid to workers challenging "compulsory unionism".

On or shortly after March 4, 1980, ALPA served plaintiffs with its First Set of Interrogatories and Request for Production of Documents. These inquiries seek information to support the union's Fourth Affirmative Defense. *See* Answer, filed August 25, 1980, at p. 3. By that defense, ALPA alleges that NRWF is an "interested employer association" under 29 U.S.C. § 411(a)(4) which may not lawfully represent the plaintiffs in their suit against the union. The disputed statute is otherwise known as § 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). It protects the right of union members to institute legal actions against their unions. ALPA bases its Fourth Affirmative Defense upon the second proviso to § 101(a)(4):

> ...no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

NRWF takes the position that § 101(a)(4) is inapplicable on its face. It has accordingly moved to strike the union's Fourth Affirmative Defense. Even if the statute is held to apply, NRWF resists enforcement of the union's discovery requests, fearing that such inquiries into its contributor lists could undermine its financial support and effectiveness as a legal aid organization. Finally, NRWF suggests that the second proviso to § 101(a)(4), if applied, would unconstitutionally infringe plaintiffs' rights to legal representation.

ALPA argues for a broad construction of the second proviso. Although § 101(a)(4) purportedly guarantees rights only to union "members", defendant contends that the statute and its proviso should apply equally to non-union workers in an "agency shop". To support this argument, ALPA draws an analogy to the relatively broad construction of "membership" under the National Labor Relations Act (NLRA). For example, in *NLRB v. General Motors Corporation*, 373 U.S. 734, 83 S. Ct. 1453 (1963), the Supreme Court held that the Wagner Act, which permits labor organizations "to require as a condition of employment membership therein" [29 U.S.C. § 158(a)(3)], also permits the less restrictive requirements of an "agency shop". Relying on *General Motors*, the Ninth Circuit has held that an employee who pays agency shop service charges is a union "member" for purposes of protection from discharge under sections 8(a)(3) and 8(b)(2) of the NLRA. *NLRB v. Hershey Foods Corporation*, 513 F.2d 1083, 1087 (9th Cir. 1975).

For purposes of this case, however, the controlling definition of "member" is that contained in § 3(o) of the

LMRDA itself:

> "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

29 U.S.C. § 402(o). Courts have consistently relied on this definition to determine which persons may assert rights and privileges under § 101(a)(4). *See, e.g., Gavin v. Structural Iron Workers*, 553 F.2d 28, 30 (7th Cir. 1977); *Moynahan v. Pari-Mutuel Employees Guild of California, Local 280*, 317 F.2d 209, 210-211 (9th Cir. 1963), *cert. denied*, 375 U.S. 911, 84 S. Ct. 207 (1964). Plaintiffs reason that because § 3(o) is read narrowly to define those who may obtain relief under section 101(a)(4), it should be read in the same way to decide who is bound by the second proviso.

Plaintiffs have also identified serious constitutional issues which arise if the Court adopts a broad construction of "member" and applies the second proviso to § 101(a)(4). Applying that proviso would effectively deprive plaintiffs of their legal counsel, even though their Complaint has already been found to state a valid cause of action under the Railway Labor Act. Another constitutional problem is posed by ALPA's requests for discovery about NRWF contributors. Disclosure of this information could impair the Foundation's ability to

continue raising funds for its legal aid activities. As the Supreme Court said in *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585, 91 S. Ct. 1076, 1082 (1971):

> The common thread running through our decisions in NAACP v. Button, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.

Discussing the second proviso to § 101(a)(4) and its constitutional implications, the D.C. Circuit has written:

> Any law that adversely affects the exercise of first amendment freedoms in connection with legal aid activity must be necessary to correct a serious and substantive evil and must be precisely drawn to serve that purpose. *See, UMW, District 12 v. Illinois State Bar*, 389 U.S. 217, 222, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, et al. v. NRWF, 590 F.2d 1139, 1147 (D.C. Cir. 1978) (*Auto Workers*).

The court in *Auto Workers* went on to offer the following rule for construing the second proviso:

> When the constitutionality of a statute is drawn into question, a court must "'ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *IAM v. Street*, 367

> U.S. 740, 749-50... In deciding among possible interpretations of a statute, the court must select an interpretation that appears to be consistent with the statute's constitutionality.

590 F.2d at 1148.

Plaintiffs in this action have all been expelled from ALPA. They do not seek reinstatement in the union. By a literal reading of 29 U.S.C. § 402(o), they do not qualify as "members" under the LMRDA.

By its terms, the second proviso applies to "any such action", which refers back to suits by union members against their unions. The second proviso should apply to no broader group of employees than those whose right to sue is protected under the main part of § 101(a)(4). Applying the definition of "member" in § 3(o) of the LMRDA, plaintiffs' suit should not be subject to the proviso.

Although ALPA argues for a broader construction of "member", the Court is unwilling to expand the literal scope of § 3(o) without some clear indication that Congress intended such a result. There is no such indication in this record. Indeed, it is plaintiffs' construction which best corresponds to the general scope of § 101(a)(4). The body of that statute relates to intra-union rights (e.g. between regular members and their labor organizations). It follows that the second proviso should correspondingly apply only to actions between unions and their members. A literal application of § 3(o) further avoids the serious question of whether the proviso is an unconstitutional restraint on plaintiffs' access to legal counsel.

The Court finds that plaintiffs, having been expelled from ALPA, are not "members", as defined by 29 U.S.C. § 402(o). The Court further finds that the second proviso to § 101(a)(4) does not apply to legal actions by employees who are not "members" as defined in § 3(o) of the LMRDA. It follows that the second proviso does not apply to plaintiffs' action in this case.

Under Rule 12(f), Fed. R. Civ. P., the Court may strike "from any pleading any insufficient defense". The striking of such defenses is a proper means for expediting legal proceedings. *See, e.g., United States v. 416.81 Acres of Land*, 514 F.2d 627, 630 n.3 (7th Cir. 1975) (opinion by Mr. Justice Clark, sitting by designation). A defense is insufficient "if it is clearly invalid as a matter of law". *Anchor Hocking Corporation v. Jacksonville Electric Authority*, 419 F. Supp. 992, 1000 (M.D. Fla. 1976).

The granting of motions to strike is not generally favored, because it is difficult to establish that a defense is clearly insufficient. When such a showing is made, however, the Court should grant a motion to strike "to avoid unnecessary time and money in litigating invalid, spurious issues." *Id.*, at 1000.

In this case, ALPA's Fourth Affirmative Defense is clearly insufficient as a matter of law. This conclusion follows from the Court's finding that § 101(a)(4) of the LMRDA does not apply to plaintiffs' action. It is therefore appropriate that ALPA's Fourth Affirmative Defense be stricken from the Answer.

With the second proviso to § 101(a)(4) having been held inapplicable, defendant's proposed discovery no longer bears any apparent relation to the issues at trial. In addition, the granting of such discovery could very well prejudice the activities of NRWF as a legal aid organization. On these facts, it is appropriate to deny enforcement of ALPA's First Set of Interrogatories and Request for Production of Documents.

Plaintiffs' Motion to Strike is accordingly GRANTED. The Clerk is directed to strike the Fourth Affirmative Defense from the copy of defendant's Answer which was filed on August 25, 1980.

Plaintiffs' Motion for a Protective Order is also GRANTED. Rule 26(c), Fed. R. Civ. P. Plaintiffs are accordingly not required to respond to ALPA's First Set of Interrogatories and Request for Production of Documents.

IT IS SO ORDERED.

The Clerk is further directed to mail uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 31st day of October, 1980.

/s/ Barbara J. Rothstein
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Thomas D. Klemens, Colin F. Dearing, Thomas G. Giefer, Roy A. C. Hill, Robert G. Maiers,
Plaintiffs,

vs.

Air Line Pilots Association, International,
Defendant.

No. C79-587S

AMENDED ORDER ON DEFENDANT'S MOTION FOR DISMISSAL, OR ALTERNATIVELY FOR SUMMARY JUDGMENT

(Filed February 12, 1980)

In 1972, the plaintiff, Thomas D. Klemens, was employed as a pilot by Northwest Airlines, Inc. (Northwest). He was a member of the Air Line Pilots Association, International (ALPA), the statutory exclusive collective bargaining agent for Northwest pilots. Since October 3, 1972, an "agency shop" agreement was in effect between Northwest and ALPA.

In 1972 after the termination of a pilots' strike, a number of Northwest pilots with low seniority were not immediately recalled to active flying status. On October 6, 1972, the Northwest Master Executive Council (MEC) passed resolution 1-72, which authorized an assessment upon working Northwest pilots to pay a monthly benefit to the Northwest pilots who were not recalled.

Mr. Klemens refused to pay the 1-72 assessment because it was levied only against Northwest pilots and not against the ALPA membership as a whole. However, Mr. Klemens continued to pay his regular membership dues to ALPA until October, 1975, when he was expelled from the union for failure to pay the 1-72 assessment.

After his expulsion from ALPA, Mr. Klemens refused to pay the "service charge" (equivalent to dues) which is generally required from non-union employees under the "agency shop". He based his refusal upon Section 2, Eleventh, of the Railway Labor Act [45 U.S.C.A. § 152, Eleventh].

By letter dated December 8, 1976, ALPA requested Northwest to discharge Mr. Klemens for delinquency in "service charge" obligations under the Union Security Agreement. When Northwest threatened to discharge Mr. Klemens, the latter paid his alleged deficiency to ALPA, whereupon the union withdrew its request for his discharge.

On May 8, 1979, Mr. Klemens filed a Complaint seeking a declaratory judgment that he is not obligated to pay the ALPA "service charge" which he is currently rendering under protest. He is joined by pilots Hill, Maiers, and Giefer, who are similarly if not identically situated. He is also joined by pilot Dearing, who was expelled from ALPA for refusing to return an alleged overpayment of strike benefits. Their common claim is that their union membership was "terminated for [a] reason other than the failure...to tender the periodic dues, initiation fees, and assessments...uniformly required as a

condition of acquiring or retaining membership." 45 U.S.C.A. § 152, Eleventh (a). Plaintiffs also argue that ALPA has breached its duty of fair representation.

The defendant responds that the above-quoted language from section 152, Eleventh, was incorporated into section (a)(1) of the Union Security Agreement between ALPA and Northwest, as follows:

> Membership in the Association or payment of the aforesaid service charge shall not be a condition of employment for any pilot to whom membership is denied or terminated for any reason other than the failure to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Association, ...

The Union contends that the plaintiffs' claims are strictly contractual and bound by the grievance-arbitration procedure set forth in section (e) of the Union Security Agreement. ALPA denies that plaintiffs have a cause of action under the Railway Labor Act which is cognizable by this Court, and it moves to dismiss the Complaint. The union insists that arbitration is compelled both by the Railway Labor Act and by general federal labor policy, as developed by case law. Finally, the defendant argues that no rights arise under the federal statute unless plaintiffs have first been discharged. As an alternative to an Order of Dismissal, ALPA seeks summary judgment in its favor.

After reviewing the Motion, memoranda, and pleadings filed herein, and being fully advised, the Court rules as follows:

Plaintiffs' claim is within the subject matter jurisdiction of this Court if it arises "under any Act of Congress regulating commerce." 28 U.S.C. § 1337. The Railway Labor Act has been held to qualify as such an "Act" for purposes of federal court jurisdiction. *See, e.g., Felter v. Southern Pacific Co.*, 359 U.S. 326, at 329, 79 S. Ct. 847, at 851 (1959). Indeed, Congress intended labor organizations to "be held accountable for violations of section 2 ... (Eleventh)", *Brady v. Trans World Airlines*, 401 F.2d 87, at 102 (3rd Cir. 1968), *cert. denied* 393 U.S. 1048, *rehearing denied* 394 U.S. 955 (1969).

Plaintiffs have stated a cause of action under Section 2, Eleventh, of the Railway Labor Act, 45 U.S.C. § 152, Eleventh. Defendant suggests that this provision merely authorizes a union shop (and by construction, an "agency shop"). However, this reading ignores the proviso to that section which states that such labor agreements shall not require membership (or by construction, the payment of alternative "service charges") from employees whose union membership was

> denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments...uniformly required as a condition of acquiring or retaining membership.

The mere fact that section (a) of the Union Security Agreement between Northwest and ALPA incorporates the language of Section 2, Eleventh, does not reduce public rights under the statute to exclusively private contractual rights. *See Brady, supra*, 401 F.2d at 95-96. This Court's jurisdiction over claims arising under federal statutes is not so easily foreclosed.

Moreover, the defendant has cited no specific language in the Railway Labor Act which requires the present dispute to be arbitrated. At 45 U.S.C. §§ 183-184, the Act designates certain disputes "between an employee or [a] group of employees and a carrier or carriers" for mediation or arbitration, but the Act does not require such handling of disputes between employees and their bargaining representatives. In fact, the defendant conceded that the present claim is not within the jurisdiction of the System Board of Adjustment (in oral argument before this Court, October 12, 1979). *See also Brady, supra*, 401 F.2d at 92. It follows that

> Since the controversy arises under the laws of the United States, 45 U.S.C., Section 151 et seq., ... the case is within the jurisdiction of the District Court, 28 U.S.C., Sections 1332 and 1337, unless under the Railway Labor Act jurisdiction is vested in one of the administrative boards.

Brotherhood of Railroad Trainmen v. Smith, 251 F.2d 282, at 285 (6th Cir. 1958).

The defendant union contends that broad federal policy favors the arbitration of this labor dispute, but its authority for this contention is inapposite. ALPA cites cases arising in the collective bargaining context, i.e. between labor and management. There, arbitration is favored as a "substitute for industrial strife", *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, at 578, 80 S. Ct. 1347, at 1350 (1960), or as a *quid pro quo* for a union's agreement not to strike, *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, at 248, 90 S. Ct. 1583, at 1591 (1970). Those rationales for arbitration do not apply in the present suit

by employees against their bargaining representative.

Moreover, this case is distinguishable from those cited by the defendant in which federal courts required employees to pursue intraunion remedies before going to court. *See Buzzard v. Local Lodge 1040 of the International Association of Machinists and Aerospace Workers*, 480 F.2d 35 (9th Cir. 1973); *Frederickson v. System Federation No. 114*, 436 F.2d 764 (9th Cir. 1970). Here, by contrast, there is no allegation of unexhausted remedies available under ALPA's Constitution or bylaws. Rather, the question is whether the grievance procedure outlined in section (e) of the Union Security Agreement is binding upon plaintiffs in the claim at bar.

On these facts, section (e) of the Union Security Agreement is not applicable. By its express terms, it applies only to

> A grievance by an employee who is to be discharged as the result of an interpretation or application of the provisions of this Union Security Agreement....

The plaintiffs correctly point out that

> since the Plaintiffs are currently paying the required service fees, there is nothing to trigger the sequence of events leading up to the contractual arbitration proceeding.

Plaintiffs' Memorandum, filed September 14, 1979, at pp. 5-6. The defendant concedes that there is no allegation that ALPA has a pending request for Northwest to discharge the plaintiffs. Therefore, this Court need not

now decide whether section (e) would bind the plaintiffs in the event of their discharge. It is enough to decide that where, as here, the employees have neither been discharged nor face imminent discharge, the grievance procedure under section (e) is inapplicable.

In addition, there is no merit to defendant's suggestion that plaintiffs have no justiciable claim until they are discharged. Their payment under protest of union service charges, if wrongfully required of them, gives rise to actionable damages under the proviso to 45 U.S.C. § 152, Eleventh.

Because neither the Railway Labor Act nor the Union Security Agreement requires the arbitration of plaintiffs' dispute, they may invoke the jurisdiction of this Court to pursue their statutory claims under 28 U.S.C. § 1337. The defendant's Motion to Dismiss is accordingly DENIED.

There is, however, some merit to defendant's prayer for summary judgment regarding plaintiffs' allegation that ALPA breached its duty of fair representation. Writing for the Ninth Circuit, Judge Eugene A. Wright explained that

> Fair representation is a statutory duty of the union to represent fairly all its members, both in the conduct of collective bargaining and in the enforcement of the resulting collective bargaining agreement. Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, ... (1967). ...
>
> Of course, for such a claim to succeed, there must be "substantial evidence of fraud, deceitful action, or dishonest conduct" on the part of the union.

[citing cases]

Buzzard, supra, 480 F.2d 35, at 40. The Fifth Circuit added

> A DFR [duty of fair representation] breach occurs only when a union's dealings with the employer, ostensibly on behalf of a member of the bargaining unit, show that the union's conduct toward the member has been arbitrary, discriminatory, or in bad faith.

Smith v. Sheet Metal Workers, 500 F.2d 741, at 750 (5th Cir. 1974). Plaintiffs' present claim does not arise from ALPA's representing plaintiffs in "dealings with the employer". Rather, it arises in the direct relationship between a union and members of its bargaining unit. The statutory duty of "fair representation" does not apply in this context, and the defendant is entitled to a partial summary judgment as a matter of law. Federal Rule 56(c). Therefore, and only as to plaintiffs' claim that ALPA breached its duty of fair representation, summary judgment is GRANTED. As to plaintiffs' other claims arising under the Railway Labor Act, summary judgment is DENIED.

The Clerk of this Court is directed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 12th day of February, 1980.

/s/ Morell E. Sharp
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Thomas D. Klemens, *et al.*,
Plaintiffs-Appellees-Cross-Appellants

vs.

Air Line Pilots Association, International,
Defendant-Appellant-Cross-Appellee.

Nos. 81-3657
81-3710

ORDER

(Filed June 20, 1984)

BEFORE: CHOY and FLETCHER, Circuit Judges, and MacBRIDE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and Judges Choy and Fletcher have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* The Honorable Thomas J. MacBride, Senior District Judge for the Eastern District of California, sitting by designation.